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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG, ALMA M. CALHOUN and EDDIE HALGROVE,
Respondents.

On Writ Of Certiorari To The Supreme Court of Alabama

BRIEF AMICI CURIAE OF AETNA LIFE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, BANKERS LIFE AND CASUALTY COMPANY, THE OHIO CASUALTY INSURANCE COMPANY AND RESERVE LIFE INSURANCE COMPANY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici shall address the following question:

Whether the Due Process Clause of the Fourteenth Amendment prohibits the imposition of a punitive damage award in a case in which the applicable state law does not establish the maximum punishment to which a defendant may be exposed for conduct found to warrant punishment.

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INTEREST OF THE AMICI CURIAE

Amicus Aetna Life Insurance Company challenged in this Court the "lack of standards governing punitive damages in Alabama" under the Due Process Clause of the Fourteenth Amendment in *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986), in which the Court first recognized that the stan-

dardless discretion of juries to impose punitive damages raises "important" federal constitutional questions.

Two years later, in *Bankers Life and Casualty Co.* v. *Crenshaw*, 486 U.S. 71 (1988), amicus Bankers Life and Casualty Company argued to this Court that the unfettered discretion of juries to inflict punitive damages in virtually unlimited amounts pursuant to vague, retroactively applied standards violated the Due Process Clause.

In a case presently on this Court's docket, amicus Reserve Life Insurance Company seeks review of a $500,000 punitive damage award imposed by a United States District Court after a bench trial for "bad faith" delay in paying an insurance claim based upon Reserve's alleged violation of a substantive standard of conduct that was created by judicial decision four years *after* the conduct at issue. *Eichenseer* v. *Reserve Life Insurance Co.*, 881 F.2d 1355 (5th Cir. 1989), *stay granted*, March 19, 1990 (A-620), *cert. pending* (No. 89-1303). The United States Court of Appeals for the Fifth Circuit, like the Supreme Court of Alabama in the case at bar, held that a potpourri of "factors" applied by the trial court in determining the amount of the award sufficiently constrained the power to punish for purposes of the Due Process Clause, and affirmed the judgment. *Id.*, at 1363. Judge Jones, joined by Judges Gee, Jolly, and Smith, dissented from denial of rehearing *en banc* in *Reserve Life* on the grounds that the "bad faith refusal tort . . . mocks our notions of fundamental fairness embodied in the Due Process Clause" because it simultaneously deprives defendants of advance notice of "the conduct

that could result in punitive damage awards" and gives courts and juries "unbridled discretion to punish" for engaging in such conduct. 894 F.2d 1414, 1415 (5th Cir. 1990).

Amicus The Ohio Casualty Insurance Company was recently assessed with a $10,000,000 punitive damage award by a California jury for alleged bad faith handling of an insurance claim; the punishment was affirmed by a California Court of Appeal in an "unpublished" opinion that rejected Ohio's federal due process objections to punishment in the absence of an express statutory range of penalties. *G. Amador Corp.* v. *The Ohio Casualty Insurance Co.*, B029795 (Cal. Ct. App. Dec. 28, 1989), *stay granted*, April 17, 1990 (A-713) (O'Connor, Circuit Justice). The Supreme Court of California, consistent with its practice in recent years to refuse to examine the constitutionality of seven- and eight-digit punitive damage awards, denied review.

Amicus Allstate Insurance Company has similarly experienced first hand the results of uninhibited punitive damage verdicts and the refusal of courts to exercise meaningful control over such verdicts under either state law or federal constitutional principles. For example, in 1987 the Supreme Court of Arizona reinstated a $3,500,000 punitive damage award against Allstate in a bad faith case notwithstanding Allstate's objections to the award under the Due Process Clause of the Fourteenth Amendment. *See Hawkins* v. *Allstate Insurance Co.*, 152 Ariz. 490, 733 P.2d 1073 (Ariz.), *cert. denied*, 484 U.S. 874 (1987).

Amici collectively conduct their respective insurance businesses in all fifty States and, each day, process thousands of insurance claims. In most of those jur-

isdictions, a mistake or delay in handling a claim may result in an unpredictable and excessive punitive damage award because of a determination, made years later, that the claim should have been handled with greater sensitivity or less frugality. In addition to the amorphous common law fraud concepts applied in the case at bar,[1] the courts and legislatures of many States have authorized unlimited punitive damage awards for "bad faith" failure to pay an insurance claim, a new form of tort that has been recognized by this Court as nothing "more than a way to plead a certain kind of contract violation . . . in order to recover exemplary damages not otherwise available under [state contract] law." *Allis-Chalmers Corp.* v. *Leuck*, 471 U.S. 202, 217 (1985).[2]

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[1] Since its decision in this case, the Supreme Court of Alabama has again rejected a Due Process Clause challenge to a punitive damage award imposed vicariously against an insurance company on the basis of the alleged fraud of an independent sales agent. *Simmons* v. *General American Life Insurance Co.*, No. 87-1339 (Ala. Dec. 22, 1989) (affirming $600,000 punitive damage award), *stay pending* (A-845).

[2] For example, in February 1990 the Pennsylvania legislature passed and its Governor signed into law H.B. 121 authorizing "bad faith" actions and the imposition of unlimited punitive damages based upon a finding that an insurer has "acted in bad faith." Pa. H.B. 121, § 3, *amending Pa. Code*, ch. 83, tit. 42 (signed Feb. 7, 1990) (adding § 8371). As is typical in this area of the law, the legislation does not even purport to define the term "bad faith," which has also not been defined by the Pennsylvania courts because those courts have in the past refused even to recognize a bad faith right of action. *See, e.g., D'Ambrosio* v. *Pennsylvania National Mutual Casualty Insurance Co.*, 494 Pa. 501, 431 A.2d 966 (Pa. 1981).

This "tortification of contract law"[3] has converted civil justice systems into uncontrolled and manifestly erratic organisms that have begun to supersede criminal justice systems as the arenas in which to punish and deter conduct perceived to be antisocial. The virtually unlimited monetary punishments that can be inflicted in these cases because a defendant "acts with a certain mental state," *Bankers Life*, 486 U.S., at 87 (O'Connor, J., concurring), injects enormous uncertainties into an area of the law in which predictability and regularity are of particular importance. *See Los Angeles Dept. of Water & Power* v. *Manhardt*, 435 U.S. 702, 721 (1978) (discussing the deleterious effect of "[d]rastic changes in the legal rules governing . . . insurance funds").

Amici contend that the Due Process Clause of the Fourteenth Amendment precludes judicially imposed punishments absent *advance* notice of the precise public wrong for which society will extract punishment and *advance* notice of the range of penalties that might be inflicted for that specific conduct.[4]

SUMMARY OF ARGUMENT

Punitive damages are intended not to compensate for an injury inflicted but to impose an extracompensatory punishment for conduct that is perceived to be antisocial. As is true in most jurisdictions today,

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[3] M. Peterson, S. Sarma & M. Shanley, *Punitive Damages* iv (Rand Inst. for Civil Justice 1987).

[4] The Court need not determine in this case the circumstances under which a punitive damage award within a legislatively established range of punishments could be subject to additional constitutional limitations under the Due Process Clause.

the Alabama regime that produced the $1,077,978 punishment in this case authorizes the punishment for deviation from vague, evolving and elastic "standards" and permits unfettered discretion to render a punishment in virtually any amount. The court below has stated that it "can envision no set of carved-in-granite standards that would guide every jury" in punitive damage cases because "the *degree* of punishment necessary to achieve [the goals of punishment and deterrence] changes in every case" and in some cases "juries should be entitled to punish defendants so severely as to destroy them; justice demands that." *Central Alabama Electric Cooperative* v. *Tapley*, 546 So. 2d 371, 377 (Ala. 1989) (emphasis in original). Neither the jury nor the court below was constrained in any way by a legislative (or even common law) limit on the amount of punishment that could be inflicted against petitioner.

This unchecked license to impose a punishment in virtually any amount violates a fundamental principle underlying the Due Process Clause: that a State may impose punishment on its citizens only pursuant to standards established in advance. Historically, the responsibility for establishing appropriate levels and limits of punishment for antisocial conduct has been regarded as quintessentially that of the legislature. In the Colonies, the establishment of maximum punishments by statutes (or their equivalent) was commonplace, reflecting the Colonists' rejection of any system in which the severity of punishment was left to the *post hoc* discretion of juries or judges. By the time the Fourteenth Amendment was ratified, the States had uniformly rejected the concept of common law crimes by enacting comprehensive criminal codes

defining substantive crimes and establishing specific ranges of punishment for those crimes.

Punitive damages serve the same purposes as criminal sanctions. Their infliction in the absence of legislatively prescribed limits therefore departs from the historical pattern that the judicial imposition of punishment must be preceded by adequate notice and articulated limitations. States that permit the award of punitive damages in the absence of statutory limits deprive citizens of the notice that is the necessary antecedent for constitutional punishment under the Due Process Clause of the Fourteenth Amendment.

ARGUMENT

A. Punitive Damages Are *Ad Hoc*, Capricious and Essentially Limitless Punishments Imposed Without Standards, Uniformity or Predictability

The tort system vests the factfinder with wide latitude to determine the amount of compensatory damages[5] necessary to make a plaintiff whole for actual injuries to redress a private wrong, but at least the compensatory function provides some theoretically objective guidance.[6] In assessing punitive damages, however, judges and juries are "guided by little more than an admonition to do what they think is best." *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco*

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[5] *See, e.g., Miller* v. *Schnitzer*, 78 Nev. 301, 371 P.2d 824, 828-29 (1962) ("The extent of such damage, by its very nature, falls peculiarly within the province of the trier of fact . . . . [A]n appellate court will disallow or reduce the award if its judicial conscience is shocked; otherwise it will not."). *Compare Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) (jury need only make a "just and reasonable estimate").

[6] *Cf. Hicks* v. *Feiock*, 485 U.S. 624, 647 (1988) (O'Connor, J., dissenting).

Disposal, Inc., 109 S. Ct. 2909, 2923 (1989) (Brennan, J., concurring). Thus, in this case the jury was not informed what maximum punishment might be appropriate to fulfill society's objectives of retribution and deterrence in redressing the alleged public wrong; nor was it limited by any other meaningful standards or guidelines by which to make its ultimate determination of the severity of the punishment to impose on petitioner. The trial court could not provide the jury with such guidance because no fixed limitations or objective standards had been established in Alabama to aid civil juries in performing retrospectively in individual cases the role assigned prospectively and generically in criminal cases to the legislature—that of prescribing the limits of permissible punishments for particular offenses.

In fact, civil juries are entrusted with the power to punish and to establish *ad hoc* levels of punishment in cases in which the substantive standards are themselves in a state of constant evolution. *See Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 822 (1986). In many punitive damages cases, the standard of liability is itself like "a predator lurking in the shadows to pounce on the unsuspecting." *Reserve Life*, 894 F.2d, at 1420. (Jones, J., dissenting from denial of rehearing *en banc*).[7] Having found liability under mercurial standards of conduct, civil juries are typically given

[7] Although not to be considered in detail in this brief, amici submit that the uncertainty regarding *what* conduct will warrant punitive damages reinforces the contention that the Due Process Clause requires, at a minimum, that the upper limit of punishment be established in advance of the conduct subsequently alleged to warrant the imposition of punitive damages.

guidance no more explicit than that the amount of the award must be sufficient to punish and deter. *See, e.g., Standard Life Insurance Co. of Indiana* v. *Veal*, 354 So. 2d 239, 249 (Miss. 1977).

As Justice O'Connor has observed, " 'the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury.' " *Bankers Life*, 486 U.S., at 88 (O'Connor, J., concurring), *quoting Bankers Life and Casualty Co.* v. *Crenshaw*, 483 So. 2d 254, 278 (Miss. 1985). Given this state of affairs, no person potentially subject to punitive damages can possibly know in advance how much punishment a jury might impose. Moreover, appellate review is of no comfort because jury verdicts generally will be overturned only if the punitive award is subjectively perceived by appellate judges as "grossly and manifestly excessive," *Browning-Ferris*, 109 S. Ct., at 2922 n.24, or happens to " 'shock [the] judicial conscience.' " *Hospital Authority of Gwinnett County* v. *Jones*, 386 S.E.2d 120, 126 (Ga. 1989), *cert. pending* (No. 89-1315); *accord Ace Truck & Equipment Rentals, Inc.* v. *Kahn*, 746 P.2d 132, 137 (Nev. 1987) (punitive damage award will not be disturbed so long as it is "fair and just and reasonable [according to the] sense [of right and wrong] most of us possess from childhood").

In affirming a $10,000,000 punitive damage award against amicus Ohio Casualty, the California Court of Appeal justified this extremely vague and deferential standard of appellate review as follows: "The calculation of punitive damages involves a 'fluid process of adding or subtracting depending on the nature of the acts and the effect on the parties . . . ' and in this

regard juries have wide discretion in determining what is proper . . . . The more reprehensible the act, the greater the appropriate punishment." *G. Amador Corp.* v. *The Ohio Casualty Insurance Co.*, No. B029795, slip op., at 27-28 (Cal. Ct. App. Dec. 28, 1989) (unpublished) (citations omitted), *stay granted*, April 17, 1990 (A-713) (O'Connor, Circuit Justice).

This "fluid process" of punishment is activated in most cases by private prosecutors who seek not only full compensation for their own losses, but also a windfall punitive damage "bounty" as a reward for their efforts. *Smith* v. *Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting). It is not surprising that private plaintiffs would in such circumstances seek to extract the largest possible punitive award irrespective of any relationship to the public purposes for which it is in theory inflicted. As has been observed, "[a] person who is to profit by the punishment of another is likely to prefer severe punishment to admonition which will best serve social ends, and the two are not necessarily synonymous . . . ." Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1178 (1931).[8]

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[8] The Court recently noted the incongruity of a similar arrangement in *Young* v. *United States ex rel. Vuitton et Fils*, 481 U.S. 787 (1987). In that case, the Court exercised its supervisory power to preclude appointment of interested private litigants to prosecute criminal contempt actions against opposing private litigants, even though the system in question turned the punitive fine over to the government. In *Young*, Justice Blackmun expressed the view that such prosecutors must, as a matter of due process, be able to serve the public interest to the exclusion of any private interest; thus, he would have reached the same result as a matter of constitutional compulsion. *Id.*, at 815 (Blackmun, J., concurring).

The punitive damage system operates without giving advance notice of what punishment may be imposed for what conduct. That it operates in this fashion is primarily an historical accident. As in England,[9] early punitive damage cases in this country confused the rationale for imposing "exemplary" damages, deeming them compensation for "intangible injuries" or ascribing dual compensatory and punitive justifications to jury awards that apparently exceeded the amount necessary to compensate for actual tangible injury. *See, e.g., McNamara* v. *King*, 7. Ill. (2 Gilm.) 432, 436 (1845). As the concept of actual damages expanded to include compensation for intangible injuries such as mental anguish, there was "nothing left for 'exemplary damages,' as formerly understood, to operate upon" and punitive damages generally came to be understood to refer to "punishment for the sake of public example . . . ." *Fay* v. *Parker*, 53 N.H. 342, 384 (1872). Because punitive damages were the product of the evolving common law tort compensation system, these monetary punishments imposed in ostensibly civil proceedings were, unlike monetary punishments imposed in criminal proceedings, left to the virtually unlimited, and rarely disturbed, discretion of the jury.

The inconsistency between having statutorily limited monetary punishments in criminal cases and unlimited monetary punishments in punitive damage cases did not go unnoticed. A commentator observed in 1912 that "[it] certainly appears to be an incongruity that one may be punished by the public for

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[9] *See, e.g., Tullidge* v. *Wade*, 3 Wils. K.B. 18, 95 Eng. Rep. 909 (C.P. 1769).

the crime . . . by a fine limited by statute, and again punished in favor of the sufferer . . . for the same act, by exemplary damages, with little limit on the discretion of the jury." W. Hale, *Handbook on the Law of Damages* §§ 87-88, at 306 (2d ed. 1912). The full impact of this limitless punishment regime on the civil justice system was not, however, felt until much later. As long as punitive damage awards were relatively rare and modest in amount, the system could tolerate an occasional aberration. The frequent and random imposition of massive punitive damage awards is a relatively recent phenomenon. *See Browning-Ferris*, 109 S. Ct., at 2924 (O'Connor, J., concurring and dissenting). In the last two decades, the doctrine transformed from a mere appendage to the tort compensation system designed to make a defendant "smart"[10] into a full-fledged punishment scheme that, as the court below has recognized, permits juries to punish so severely as literally to destroy a defendant. *See Central Alabama Electric Cooperative*, 546 So. 2d, at 377.

B. Colonial and Early American Jurisprudence Rejected the Concept That Punishment Could Be Inflicted Without Express, Pre-Established Limits

The principle that limits on punishments must be prescribed in advance, and its corollary that judges and juries may not set such limits on an *ad hoc* basis, were incorporated in our jurisprudence when the first Colonists arrived on this continent in the early 17th Century. For example, Chapter III of "The General Laws and Liberties of New Plimouth Colony" sets forth a detailed scheme of punishments, including monetary punishments characterized simultaneously

[10] *See Fay v. Parker*, 53 N.H., at 354.

as "amercements" and "fines" which could be imposed upon conviction of a crime. *See The Laws of the Pilgrims* (J. Cushing ed. 1977) (unnumbered pages). The Colonists' rejection of the notion that a person could be punished without advance notice of the maximum punishment for particular conduct, was virtually universal. As stated in the Massachusetts Body of Liberties of 1642,

> no mans person shall be arrested, restrayned, banished, dismembred, nor any wayes punished . . . unless it be by vertue or equities of some expresse law of the Country warranting same, established by a general Court and sufficiently published . . . .

1 B. Schwartz, *The Bill of Rights: A Documentary History* 78 (1980); *see also* P. Reinsch, *English Common Law in the Early American Colonies* 53 (1977) (codification of "essential elements of the law" was universally considered necessary in the Colonies).

In establishing this principle, the Colonists were implementing a precept of ancient lineage going back to the Latin canon, "Nullem crimen, nulla poena, sine lege," the modern translation of which is, "there can be no crime, *and no punishment*, except as the law prescribes it." M. Frankel, *Criminal Sentences* 3 (1972) (emphasis in original). The Colonists' acceptance of the concept "nulla poena, sine lege" was subsequently manifested in the States in the complete codification of the criminal law and, ultimately, the rejection of the concept of common law crimes. *See* L. Friedman, *A History of American Law* 573 (2d ed. 1985).[11] As of the time of the ratification of the

[11] In the early 19th Century, this Court rejected the concept

Fourteenth Amendment, nearly every State had enacted a comprehensive criminal code that defined punishable crimes and fixed maximum punishments.[12] (A compendium of those codes is reprinted in the Appendix hereto *infra*.) Moreover, as illustrated by the Court's recent unanimous decision in *Miller* v. *Florida*, 482 U.S. 423 (1987), this Court has assumed, at least since its decision in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798), that no person can be punished for the commission of an offense deemed "criminal" unless an upper limit on the punishment has been announced prior to the commission of the acts leading to conviction.

Thus, in "the early days of the Republic . . . [e]ach crime had its defined punishment." *United States* v. *Grayson*, 438 U.S. 41, 45 (1978). The " 'excessive rigidity of the [mandatory or fixed sentence] system' " gave way to a somewhat more flexible system that permitted the sentencing authority "to select a

of common law crimes at the federal level. It declared that prior to prosecution of a federal offense, Congress "must first make an act a crime [and] affix a punishment to it. . . ." *United States* v. *Hudson*, 11 U.S. (7 Cranch) 31, 34 (1812).

[12] In enacting these penal codes, the States rejected the notion of open-ended, unlimited punishments. *See, e.g., Ala. Penal Code* chs. 1-10 (1866) (punishing variety of offenses, including forgery, counterfeiting, larceny, embezzlement, murder, robbery, burglary, and arson); *see id.* § 91, 92, 101, 102, 104-110, 118, 123, 129, 130, 135, 136, 138, 140, 144, 148, 153-155, 157-159, 162, 177-184, 186-190, 192-207 (imposing maximum fines for a variety of offenses). The codification of criminal offenses with fixed maximum punishments throughout the States at and around the time of the ratification of the Fourteenth Amendment demonstrates the depth and breadth of the consensus among the several States on this question. *Cf. Burnham* v. *Superior Court of California*, No. 89-44, slip op., at 5-6 (U.S. May 29, 1990) (plurality opinion).

sentence within a *range* defined by the legislature." *Id.* at 46 (emphasis in original) (citations omitted); *see also Mistretta* v. *United States*, 109 S. Ct. 647, 650 (1989) (although "Congress early abandoned fixed-sentence rigidity [it] put in place a system of ranges within which the sentencer could choose the precise punishment"). Even under the "indeterminate sentencing" model adopted in some jurisdictions, the legislature "defined the maximum [and] the judge imposed a sentence within the statutory range." *Mistretta*, 109 S. Ct., at 651; *Grayson*, 438 U.S., at 47.[13]

This history demonstrates that woven into the fabric of our legal heritage are fundamental concepts that prohibit the imposition of punishment by the government in the absence of established limits. The rejection of unlimited monetary punishment in criminal cases casts grave doubt on the constitutionality of unlimited monetary punishments imposed by the States in civil cases. No principled constitutional distinction may be drawn between monetary sanctions that are imposed to punish and deter on the basis of whether such sanctions are labeled "criminal" or "civil" or whether they are assessed in criminal or

[13] The Sentencing Reform Act, 28 U.S.C. § 991(b)(1), was enacted, in relevant part, in response to the problems of uncertainty and inconsistency in sentencing resulting from the "unfettered discretion" conferred upon sentencing judges to impose punishment "within the statutory range fixed by Congress." *Mistretta*, 109 S. Ct., at 651; S. Rep. No. 225, 98th Cong., 1st Sess. 38-40 (1983). It is more than ironic that civil juries empowered to impose punitive damages possess vastly broader discretion than the "unfettered discretion" conferred upon sentencing judges that Congress sought to eliminate by a more determinate sentencing process.

civil proceedings. It is clear that that "[t]he notion of punishment . . . cuts across the division between the civil and criminal law," *United States* v. *Halper*, 109 S. Ct. 1892, 1901 (1989), and therefore constitutional restraints on punishment are "not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute." *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402 (1966).

C. The Establishment of a Range of Penalties Is a Quintessentially Legislative Task That Is Necessary To the Fulfillment of Punishment's Theoretical Goals of Retribution and Deterrence

While the judiciary and legislature share responsibility for the development of the law of compensation for torts,[14] legislatures customarily evaluate society's level of disapprobation for particular conduct by establishing the maximum and minimum punishments that may be imposed for specific offenses and trial courts exercise discretion to sentence within that range. *See* L. Berkson, *The Concept of Cruel and Unusual Punishment* 81-82 (1975); H.L.A. Hart, *Punishment and Responsibility* 15, 164 (1968); *see generally* J. Bentham, *The Rationale of Punishment* 411-12 (1830).[15]

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[14] Although not raised by this case, judicial creation of retroactive liability for punitive damages raises independent constitutional concerns. *See* note 7, *supra*.

[15] Aside from punitive damage schemes, the only context in which punishment is still administered in our judicial system in the absence of established limits is in connection with the courts' exercise of their inherent contempt power. In *Green* v. *United States*, 356 U.S. 165 (1958), the Court, while adhering to the historical rule that contempts of court could be tried without a jury, insisted on the "careful use and supervision" of this power

The legislature is inherently in a better position than courts or juries to make the broad, multifaceted political, social, and economic policy judgments necessary to determine the desirable range of punishment for particular misconduct. While a court "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist," a legislature "looks to the future and changes existing conditions by making a new rule to be applied thereafter . . . ." *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908); *see also Weaver* v. *Graham*, 450 U.S. 24, 29 n.10 (1981) (the legislature is confined to "penal decisions with prospective effect and the judiciary and executive to applications of existing penal law"). As the Court observed in *Gore* v. *United*

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and sustained a three-year sentence for willful disobedience of a surrender order as not being excessive because it was "well within" the maximum sentence under the federal criminal statute that punished the closely analogous crime of bail-jumping. Concern for the open-ended nature of the punishments available in contempt situations in those jurisdictions in which no legislatively imposed limits existed ultimately led the Court to interpose a jury in serious contempts, *Bloom* v. *Illinois*, 391 U.S. 194 (1968), and to impose various other procedural restrictions on the exercise of the criminal contempt power, *e.g.*, *Taylor* v. *Hayes*, 418 U.S. 488 (1974). That power is, of course, exercised only sparingly and only under an elaborate set of constitutional constraints fashioned by this Court under the Due Process Clauses of the Fifth and Fourteenth Amendments. Whatever may be said for its continued exercise in the absence of legislatively established limits on punishments, the historic concerns that have moved this Court to tolerate its existence are not present in the punitive damage system. *Cf. Hicks* v. *Feiock*, 485 U.S. 624, 647 (1988) (O'Connor, J., dissenting) ("Because the compensatory purpose limits the amount of the fines, the contemnor is not exposed to a risk of punitive sanctions that would make criminal protections necessary.").

States, 357 U.S. 386, 393 (1958), "views . . . regarding severity of punishment . . . are peculiarly questions of legislative policy. . . . " *Accord Rummel* v. *Estelle*, 445 U.S. 263, 283 n.27 (1980) (determining the "seriousness" of an offense in the first instance is a question of legislative policy); *Rosenberg* v. *United States*, 346 U.S. 273, 306 (1953) (Frankfurter, J., dissenting) ("Congress not the whim of the prosecutor fixes the sentence").

Moreover, proper fulfillment of the penal objectives of retribution and deterrence, factors that the Court has deemed relevant in determining whether a punishment comports with the Constitution,[16] implicitly mandates a legislatively established maximum punishment for a specific offense. For example, the unlimited character of punitive damages may chill desirable conduct and thereby risk overdeterrence. *See, e.g.*, *Electrical Workers* v. *Foust*, 442 U.S. 42, 50 (1979); *Browning-Ferris*, 109 S. Ct., at 2924 (O'Connor, J., concurring and dissenting); *Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting); *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 779 (1985) (Brennan, J., dissenting); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 84 (1971) (Marshall, J., dissenting). If, however, the legislature establishes a maximum punishment, some measure of predictability—at least at the outer extreme—is created. Predictability has been considered a necessary condition for punishment to achieve its goal of measured deterrence. *See* J. Bentham, *The Rationale of Punishment*, at 41; *see* 4 W. Blackstone, *Commentaries on the Laws of England* 16-17 (13th ed. 1800). Indeed, as Blackstone observed, "it must be left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society, and such as appear to be the best calculated to answer the end of precaution against future offenses." *Id.*, at 12.

[16] Applying the Eighth Amendment in *Thompson* v. *Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion), *quoting Coker* v. *Georgia*, 433 U.S. 584, 592 (1977), the Court held that the imposition of the death penalty for offenses committed by persons under 16 years of age was unconstitutional as it did not serve the retributive and deterrent objectives of punishment and was therefore "nothing more than the needless imposition of pain and suffering." Whether the punitive damage system serves or undermines the objectives of punishment is similarly pertinent in evaluating the constitutionality of that system under the Due Process Clause of the Fourteenth Amendment. *Cf. Browning-Ferris*, 109 S. Ct., at 2921 n.23 (suggesting that "the due process analysis of an award of punitive damages may track closely the Eighth Amendment analysis" urged by petitioners).

Bentham's utilitarian theory of punishment recognizes that it is the legislature's task to prescribe a range of permissible punishments for a specific offense. Positing that the goal of deterrence requires the punishment to be proportional to the guilt of the offender, Bentham set out six primary rules to guide legislators in demarking the maximum and minimum limits of punishment. Four of those rules mark the limits of punishment on the minimum side,[17] and the

[17] These four rules provide:

Rule 1. "The the value of punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offense . . . ."

Rule 2. "The greater the mischief of the offense, the greater is the expense which it may be worth while to be at, in the way of punishment . . . ."

Rule 3. "Where two offenses come in competition, the pun-

other two rules aid in establishing maximum limits.[18] J. Bentham, *An Introduction to the Principles or Morals and Legislation* 289-93 (C. Wilson & R. McCallum ed. 1945); *see* J. Bentham, *The Rationale of Punishment*, at 32-37; E. Pincoffs, *The Rationale of Legal Punishment* 23-24 (1966).

The fulfillment of the objectives of punishment has been achieved in our legal system by a complex balancing of the goals of retribution and deterrence within a framework that ensures that punishment is neither disproportionate nor excessive, a task for which an ephemeral jury, convened to consider a single isolated case, is singularly unsuited and ill-equipped. As Justice Brennan has noted, the principle

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ishment for the greater offense must be sufficient to induce a man to prefer the less . . . ."

Rule 4. "The punishment should be adjusted in such manner to each particular offense, that for every part of the mischief there may be a motive to restrain the offender from giving birth to it . . . ."

J. Bentham, *An Introduction to the Principles of Morals and Legislation* 289-93 (C. Wilson & R. McCallum ed. 1945).

[18] These two rules provide:

Rule 5. "The punishment ought in no case be more than what is necessary to bring it into conformity with the rules here given [marking the limits of punishment on the minimum side] . . . ."

Rule 6. "[T]he quantity actually inflicted on each individual offender may correspond to the quantity intended for similar offenders in general, the several circumstances influencing sensibility ought always be taken into account."

J. Bentham, note 17, *supra*, at 289-93. While Rule 6 is intended to serve as a guide to the legislator, its principal purpose is to guide the judge in conforming to the intentions of the legislature. *Id.*

of proportionality is a necessary component of our justice system because the retributive and deterrent purposes that justify punishment themselves "possess inadequate self-limiting principles." *Tison* v. *Arizona*, 481 U.S. 137, 180 (1987) (dissenting opinion).

The concept of proportionality requires that punishment be consonant with society's judgment regarding the seriousness of the offense. There must therefore be limits on punishment for each offense lest the punishment for that offense in a particular case be more severe than that which society reserves for more serious offenses. Unless it is provided with sufficient legislative guidance, a jury plainly cannot perform that function. S. Benn, *Punishment*, 7 *Encyclopedia of Philosophy* 32 (1967) (retributive justice demands that the punishment "fit the crime"); J. Bentham, *The Rationale of Punishment*, at 32-37 (deterrence will be accomplished only by scaling the expense of punishment to the mischief of the offense); L. Berkson, at 66-69; H. Dagge, *Consideration on Criminal Law* 167-71 (1772); H.L.A. Hart, at 25 ("the guiding principle is that of proportion within a system of penalties between those imposed for different offenses where these have a distinct place in a common sense scale of gravity"); W. Paley, *The Principles of Moral and Political Philosophy* 372-74 (6th ed. London 1788); E. Pincoffs, at 3-5, 23-24; E. van der Haag, *Punishing Criminals* 237 (1975).[19]

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[19] As Blackstone observed, ideally a

> scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least: but if that be too romantic an idea, yet at least a wise legislator will mark the principal divisions,

In punitive damage cases, unguided juries, like bolts of lightning, wreak retribution on individual wrongdoers in amounts determined primarily by instinct, passion and the chemistry of a particular, wholly unique case. Juries typically assess punitive damages without any special training, expertise or instruction regarding what measure of punishment is necessary to achieve retribution and deterrence in society as a whole or any informed sense of what society as an institution has determined to be suitable punishments for the same, similar, or more or less serious misconduct. Remarkably, juries in punitive damage cases are asked to perform this complex task in the absence of any legislative guidance.

To say that the punitive damage system is not well-conceived or designed to produce consistent results that fulfill society's retributive and deterrent goals is an understatement. Parties who seek punitive damages are private prosecutors whose exclusive objectives are to collect as large a bounty as they can convince juries to impose. The punitive damage system then turns over to the factfinder responsibility for determining the amount of the bounty, often based largely on the wealth of the defendant and almost always based on the degree of hostility that the prosecutor has been able to inspire toward the defendant. The chemistry of combining these two functions is calculated to produce results that bear no visible relationship to the public purposes of punitive awards. *See* Morris, *Punitive Damages in Tort Cases*, 44 Harv.

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and not assign penalties of the first degree to offenses of an inferior rank.

4 W. Blackstone, at 17-18.

L. Rev., at 1179 ("Evaluation of past conduct [at the liability stage of a trial] is a different type of problem from control of future behavior . . . . [P]roblems of social control may require more technical skill than jurymen have or can acquire."). This open incitement to the infliction of severe punishment against a defendant with a deep pocket is built into much of today's punitive damage system.

Because the punitive damage system provides wholly inadequate notice of the standards against which liability will be measured, and the punitive consequences for deviation from those standards, the goals of retribution and deterrence that provide the only justification for the system cannot be served. Without sufficient standards to guide their policy-making, juries and judges exercising vast discretion to punish do so by legislating and executing their own theories of retribution and deterrence for each particular case. *See Reserve Life*, 894 F.2d, at 1421 (Jones, J.) ("the rubrics of punishment [and] deterrence . . . are simply too uncertain to yield consistent results"). Once a jury has acted, trial and appellate judges—as ill-suited[20] as juries to make the kind of political, social and economic judgments that ought to go into the development of any fair and efficient system of punishment—make no systematic attempt to bring order and consistency to this system, even assuming they could do so by substituting their own *ad hoc* judgments for those of the juries.[21]

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[20] In the absence of legislative standards, even a conscientious trial judge is bereft of meaningful moorings when determining the amount of appropriate punishment. *See, e.g., Reserve Life*, 894 F.2d, at 1421 (Jones, J.).

[21] This judicial abstinence is often based upon the assumption

Under this "system," each punitive damage case becomes a laboratory for social engineering in which the jury formulates and applies its own unique theory of punishment and deterrence and then disbands. The existing punitive damage regime carries with it no pretense of trying to achieve coherent, rational results. Instead, it is unavoidable that it will produce bizarre and unpredictable results because there are no overarching rules to govern its operation. *See Reserve Life*, 894 F. 2d, at 1421 (Jones, J.) ("The judicial hands-off policy on punitive damages assures that no unifying principle can or will emerge from the penalties inflicted . . . .").

D. The Due Process Clause Requires Legislatively Established Limits on the Maximum Punitive Damage Award Permissible for a Particular Type of Misconduct

The Due Process Clause of the Fourteenth Amendment requires that persons who are subjected to punishment be informed in advance at least of the range of punishments available under the law for any particular conduct. This Court has observed, in the context of punishment imposed in criminal proceedings,

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that plaintiffs are constitutionally entitled to have a jury assess the amount of damages in cases in which the Constitution otherwise guarantees a jury trial on the issue of liability. This assumption, while never wholly tenable, is now clearly misdirected in light of this Court's recent decision in *Tull* v. *United States*, 481 U.S. 412 (1987). Thus, the courts have left to juries the *ad hoc* determinations of retribution and deterrence, and during this process, the one political institution in our system capable of treating the social, political and economic issues involved in determining the appropriate scale of punishments—the legislature—has abstained from establishing the necessary foundation for this aberrational and mischievous system.

that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *United States* v. *Batchelder*, 442 U.S. 114, 123 (1979). In the criminal justice system, due process therefore requires that the "range of penalties" be established in advance so as to "inform[ ] . . . the courts, prosecutors, and defendants of the permissible punishment alternatives available . . . ." *Id.*, at 126. Indeed, it is a basic principle of our criminal law that the government can prosecute a person only under a criminal statute that "fairly and clearly define[s] the conduct made criminal and the punishment which can be administered." *Berra* v. *United States*, 351 U.S. 131, 139-40 (1956) (Black, J., dissenting).[22]

In *Standard Oil Co.* v. *Missouri*, 224 U.S. 270 (1912), this Court held that a $50,000 "fine" imposed against a corporation under a "quo warranto" statute did not violate the Due Process Clause despite the absence of any statute "fixing the maximum penalty . . . and no rule for measuring damages . . . ." *Id.*, at 285. In addressing the argument that the lack of a statutory maximum penalty violated due process, the Court did not discuss the fair notice component of the Due Process Clause. Rather, the Court assumed that the "real objection is not so much to the exist-

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[22] The due process requirement that a "person of ordinary intelligence" have fair notice as to what the law commands or forbids is equally applicable in civil proceedings. *A.B. Small Co.* v. *American Sugar Ref. Co.*, 267 U.S. 233, 239 (1925) ("It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all."). *See generally Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).

ence of the power to fix the amount of the fine as the fact that when exercised by the Supreme Court of the State, it is not subject to review, and is said to be unlimited." *Id.*, at 286.

The Court rejected this objection on the grounds that the power to fix punishment "is limited . . . by the obligation to administer justice and to no more assess excessive damages than to impose excessive fines." *Id.* (citation omitted). The Court cited for this proposition *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 111 (1909), in which it had expressed the view that civil fines and damages imposed by a State violate the federal constitution if they "are so grossly excessive as to amount to a deprivation of property without due process of law." This essentially substantive due process analysis slides by the fundamental procedural objection to the imposition of punitive damages in the complete absence of statutory limits.

As the many punitive damages cases that have come to this Court in recent years amply demonstrate, post-judgment review of punitive damage awards is manifestly inadequate to protect against the infliction of arbitrary and excessive monetary punishments in the absence of a statutory range of penalties. Moreover, judicial review to determine whether a particular punitive damage verdict is excessive or disproportionate after the fact is not likely to cure the threshold flaw of the punitive damage system—the lack of *advance* notice of the amount of punishment that can be inflicted.

As Justice Marshall has observed, "[u]nlike criminal penalties, . . . punitive damages are not awarded within discernible limits but can be awarded in almost any amount . . . . [T]hese damages are the direct product of the ancient theory of unlimited jury discretion . . . . The manner in which unlimited discretion may be exercised is plainly unpredictable." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall, J., dissenting); *see, e.g.*, *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 276 n.3 (1984) (Powell, J., dissenting). "[A]lmost from the outset," *Miller* v. *Florida*, 482 U.S., at 430, this Court recognized that the Ex Post Facto Clause, Art. I, § 10, Cl. 1, is concerned with "the lack of fair notice" when a State "creat[es]" or "increas[es]" a penalty "after the fact." *Weaver* v. *Graham*, 450 U.S. 24, 28 & n.9 (1981); *Miller*, 482 U.S., at 430; *Calder* v. *Bull*, 3 Dall., at 397 (Paterson, J.) ("the enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty" after the conduct at issue has occurred). If a state legislature is barred by the Ex Post Facto Clause from creating a new penalty "after the fact," "it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result" through a common law punishment scheme. *See Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964).

CONCLUSION

In order to cause conduct within its borders to conform to ill-defined and unlimiting standards, the State of Alabama has authorized *ad hoc* civil juries to inflict punishment in whatever amount may satisfy a particular jury's concept of retribution and deterrence in a particular case. Those potentially subject to the consequences of this system cannot ascertain in advance the precise nature of the conduct that is prohibited or the level of punishment that will be

inflicted for particular antisocial acts. Such an unpredictable, bizarre, capricious and destructive system is the very antithesis of the due process guaranteed by the Fourteenth Amendment.

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APPENDIX

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At the time of ratification of the Fourteenth Amendment, most States had enacted comprehensive codifications describing the conduct which could be subjected to punishment and the maximum punishment that could be administered. *See* Ark. Stat. ch. 42 (1874) (general codification of crimes); *see id.* at §§ 1357, 1364, 1381, 1386, 1388 (imposing maximum fines for a variety of offenses); *see* Cal. Stat. ch. 99 (1850) (general codification of crimes); *see id.* ch. 99 §§ 61, 63, 69, 86, 87; *see* Conn. Gen. Stat. tit. 12 (1866) (general codification of crimes); *see id.* §§ 90-92, 160-166, 180-181 (imposing maximum fines for a variety of offenses); *see* Del. Rev. Stat. chs. 126-133 (1852) (general codification of crimes); *see id.* ch. 128, §§ 3-6, 8-19, ch. 129, §§ 1-5 ch. 130, §§ 1-5, (imposing maximum fines for a variety of offenses); *see* Fla. Stat. chs. 42-56 (1872) (general codification of crimes); *see id.*, ch. 44 §§ 5, 9, 17, 18, 49, ch. 45 § 6, 8, 9; *see* Ga. Code §§ 4286-4336 (1861) (general codification of crimes); *see id.* §§ 4332, 4468, 4470, 4480, 4482 (imposing maximum fines for a variety of offenses); *see* Digest of the Crim. Laws of Ill. (1868) (general codification of crimes); *see id.* division 7 §§ 86, 91, 95, 100, division 8 § 119; *see* Ind. Stat. chs. 6-7 (1862) (general codification of crimes); *see id.* ch. 6 §§ 36, 37, 39, 43, 46; *see* Iowa Code tit. 24 (1873) (general codification of crimes); *see id.* ch. 3 §§ 3885-3886, 3889-3890, 3898 (imposing maximum fines for a variety of offenses); *see* Kan. Gen. Stat. ch. 31 (1876) (general codification of crimes); *see id.* ch. 31 §§ 80, 109, 113, 146 (imposing maximum fines for a variety of offenses); *see* Ky. Rev. Stat. Ann. ch. 28, arts. 1-26 (1867) (punishing full range of offenses, including

offenses against the person, forgery, larceny, embezzlement, and trespass); *see id.* ch. 28, art. 14 § 6, art. 15 §§ 4, 7, art. 16 §§ 2, 5, art. 17 §§ 1-2, 6-8, 10, 12-20, 22-25, art. 18 §§ 4-5, art. 19 §§ 1-3, art. 20 § 2, art. 21 §§ 1-5, art. 22 § 3, art. 23 §§ 1-3; art. 24 §§ 2, 5, art. 25 §§ 2-5, 7-10 (imposing maximum fines for a variety of offenses); *see* La. Rev. Stat. §§ 784-975 (1870) (general codification of crimes); *see id.* §§ 811, 815-819, 821-822, 824-826 (imposing maximum fines for a variety of offenses); *see* Me. Rev. Stat. chs. 117-139 (1871) (general codification of crimes); *see id.* ch. 120 §§ 1-4, 6, 8, ch. 121 §§ 3, 6 (imposing maximum fines for a variety of offenses); *see* Md. Code art. 30 (1860) (general codification of crimes); *see id* art. 30 §§ 19-20, 34, 38; *see* Mass. Gen. Stat. chs. 161-164 (1860) (general codification of crimes); *see id.* ch. 161 §§ 43, 44, 46, 48, 54-56, 91 (imposing maximum fines for a variety of offenses); *see* Minn. Stat. ch. 54 (1873) (general codification of crimes); *see id.* tit. 4 §§ 82, 84, 87, 96-97, 102-103, 105 (imposing maximum fines for a variety of offenses); *see* Miss. Rev. Code ch. 58 (1871) (general codification of crimes); *see id.* §§ 2547, 2569, 2597, 2653, 2656-2657 (imposing maximum fines for a variety of offenses); *see* Mo. Stat. ch. 42 (1870) (general codification of crimes); *see id.* art. 3 §§ 27, 31, 59, 65-66, 68-69 (imposing maximum fines for a variety of offenses); *see* Nev. Laws ch. 54 (1873) (general codification of crimes); *see id.* §§ 2368-2369, 2379, 2386-2387 (imposing maximum fines for a variety of offenses); *see* N.H. Gen. Laws chs. 269-284 (1878) (general codification of crimes); *see id.* ch. 275 §§ 1-4, 7, 8, 10, 11 (imposing maximum fines for a variety of offenses); *see* N.Y. Stat., ch. 1, tits. 1-7 (1869) (general codification of crimes); *see id.* ch. 1, tit. 3 §§ 69, 71,

ch. 1, tit. 4 §§ 9-13 (imposing maximum fines for a variety of offenses); *see* N.C. Rev. Code. ch. 34 (1855) (general codification of crimes); *see id.* ch. 34 §§ 49, 65, 68-70, 83-88, 91-92 (imposing maximum fines for a variety of offenses); *see* Ohio Crim. Code (1878) (general codification of crimes); *see id.* ch. 3 §§ 6-7, 16, 20, 22 (imposing maximum fines for a variety of offenses); *see* Or. Stat. chs. 3-12 (1855) (general codification of crimes); *see id.* ch. 4 §§ 12-13, 16-17, 31-32, 34-40 (imposing maximum fines for a variety of offenses); *see* Pa. Rev. Penal Code (1860) (general codification of crimes); *see id.* §§ 100-106, 111-112, 119-121, 125-130, 134, 155-162, 164-165 (imposing maximum fines for a variety of offenses); *see* R.I. Stat. tit. 30 (1857) (general codification of crimes); *see id.* tit. 30, ch. 214 §§ 10, 14, 16-20, 22, 24-28 (imposing maximum fines for a variety of offenses); *see* S.C. Rev. Stat. tit. 2 (1894) (general codification of crimes); *see id.* §§ 276-282, 288-295 (imposing maximum fines for a variety of offenses); *see* Tex. Laws arts. 355-572 (1850) (general codification of crimes); *see id.* arts. 380-382, 386, 389, 391, 393 (imposing maximum fines for a variety of offenses); *see* Vt. Stat. tit. 38 (1851) (general codification of crimes); *see id.* ch. 104 §§ 2-10, 15, 19-22, 26-28 (imposing maximum fines for a variety of offenses); *see* Va. Code tit. 54 (1860) (general codification of crimes); *see id.* ch. 192 §§ 18, 24, 27, 30, 32; *see* W.Va. Code chs. 143-152 (1870) (general codification of crimes); *see id.* ch. 144 §§ 9-11, ch. 145 §§ 5-8, 23 (imposing maximum fines for a variety of offenses); *see* Wis. Stat. tit. 27 (1871) (general codification of crimes); *see id.* ch. 164 §§ 23, 29, 31-32, 38, 42, 45, ch. 165 §§ 16-18, 23 (imposing maximum fines for a variety of offenses).